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ABSTRACT

Since, in most cases, sequestration is no longer an option for judges to insure an impartial jury, judicial restraints or suppression orders directed at trial participants have become increasingly attractive. The problem is that the press has a desire to disseminate information about the judicial process to the public. Silence orders prohibiting extrajudicial comment by trial participants raise important questions about the right of participants to communicate with the public, in particular via the press, and the right of the press to gather news. Clarification of participants' rights and the correct standard of review is needed to provide nationally consistent guidelines for implementing silence orders. Trial participants, the press, and the public must be made aware of their rights when a judge issues an order proscribing extrajudicial comment. "Compelling interest" is a standard of review which provides greater clarity and precision and is a balancing of the state's interest with that of the people; that is, it insures a defendant in a criminal case a fair trial and insures that individuals' free speech rights are not unnecessarily infringed upon. Although the proposed standard is difficult to meet, it will insure that First Amendment rights are not needlessly sacrificed. (One hundred and thirty-seven notes are included.) (MS)

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JUDGES FIGHT TRIAL PUBLICITY: OPEN THE COURTROOM BUT CLOSE PARTICIPANTS' MOUTHS

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JUDGES FIGHT TRIAL PUBLICITY: OPEN THE COURTROOM BUT CLOSE PARTICIPANTS' MOUTHS

INTRODUCTION

The *New York Times* recently reported that judicial restraints issued in high-profile cases heard in the New York courts are increasing.[1] These court-ordered restraints are frequently directed at trial participants, limiting out-of-court comment. In one case, the judge issued an order that prohibited the attorneys involved from discussing any aspect of the case with the news media. The order was so broad that the attorneys could not even tell reporters the date of the next hearing.[2] The *Times* noted that while media attorneys see the restraints as a disturbing infringement on First Amendment rights, others believe they are necessary to protect defendants' rights to a fair trial.

An increase in the number of suppression orders issued in trial proceedings may result from the 1986 U.S. Supreme Court ruling in *Press-Enterprise*. Chief Justice Burger's opinion indicates that virtually all manner of judicial proceedings are now open to the public and the press.[3] In most instances, it is no longer permissible to close the courtroom to the public and press to alleviate prejudicial publicity during pretrial proceedings and trials. Judges faced with trials that are expected to command considerable publicity must seek out different measures for ensuring an impartial jury. If closure is no longer an option, silence orders directed at trial participants become increasingly attractive.

The courts have sought to silence a variety of individuals, from witnesses to the Kent State killings,[4] to former Governor Marvin Mandel of Maryland,[5] to Joel Levine and his fellow attorneys in the Miller espionage case.[6] Frequently, court orders eliminate any type of communication between trial participants and the public or press. In addition, many courts have standing no-comment rules based on Disciplinary Rule 7-107 (DR 7-107) of the

American Bar Association's Code of Professional Responsibility that apply to attorneys and court officials.[7] Thus trial participants may effectively lose their First Amendment rights at the courthouse door.

Enter the press with a desire to disseminate information about the judicial process to the public. Although the press can avail itself of opportunities to report and comment on the trial itself, communication with participants may be forbidden. An important source of information is thus eliminated. Some judges have stated that the news gathering right in the context of criminal trials means nothing more than the right to attend the trial.[8] Yet, the First Amendment seems to afford some protection for the information gathering function of the press as well as for the publication function.[9]

Silence orders prohibiting extrajudicial comment by trial participants raise important questions about the right of participants to communicate with the public, in particular via the press, and the right of the press to gather news. Sometimes these orders have been upheld by higher courts, sometimes not. No national standard of review to be applied in these cases has emerged: various courts have used "reasonable likelihood"[10] of a threat to a fair trial, "serious and imminent" threat,[11] "substantial likelihood" of a threat,[12] "clear and imminent threat",[13] and a sliding scale.[14]

Clarification of participants' rights and the correct standard of review is needed to provide nationally consistent guidelines for implementing silence orders. Trial participants, the press, and the public must be made aware of their rights when a judge issues an order proscribing extrajudicial comment.

This article has two main focus areas. First, the current status of judicial prohibition of extrajudicial comment by trial participants will be described after analysis of cases in which the courts have assessed the rights of participants, the public, and the press. Of particular interest is the standard of review courts have used, their justification for using

it, and their view of the information gathering right of the press. Then, a standard of review will be prescribed in light of court rulings on public and press access to information and on prior restraints on speech and the press.

I. Scope of Judicial Proscription of Trial Participants' Extrajudicial Comments

Trial Participants Affected by Silence Orders

Individuals who may be affected by judicial silence orders are virtually unlimited. *CBS Inc. v. Young* [15] provides an example of the extent of the inclusiveness some judges feel is necessary to alleviate the threat of prejudicial pretrial publicity. Because of the publicity surrounding a number of civil actions that arose from the Kent State killings of May 4, 1970, Judge Young entered the following order:

> For good cause appearing, it is
> **ORDERED** that in addition to all counsel and Court personnel, all parties concerned with this litigation, whether plaintiffs or defendants, their relatives, close friends, and associates are hereby **ORDERED** to refrain from discussing in any manner whatsoever these cases with members of the news media or the public.[16]

Obviously, an order with terms this all-encompassing cannot be followed: it is difficult, if not impossible, to determine to whom the order applies. As the Court of Appeals, Sixth Circuit, stated, ". . . 'relatives, close friends and associates' are given no definition with the result that a news reporter covering the trial would be at a loss to know with any degree of certainty what persons were embraced by these terms."[17]

Most silence orders do not suffer from vagueness to this degree. But if silencing the press is not a viable alternative, judges may feel they have no recourse but to silence their sources. Thus, silence orders are usually directed at some combination of plaintiffs, defendants, attorneys, and witnesses.[18]

Subject Matter Affected by Silence Orders

Judge Young's order, which was not upheld by the Sixth Circuit Court of Appeals,[19]

was also cited by the court because it suffered from "the infirmity of overbreadth as to the subject matter or content of any prohibited discussions."[20] The phrase, ". . . refrain from discussing in any manner whatsoever these cases with members of the news media or public"[21] does leave much to be desired in terms of specificity. As the court said, "According to its liberal terms no discussions whatsoever about the case are permitted by the persons upon whom the ban is placed--whether prejudicial or innocuous, whether subjective or objective, whether reportorial or interpretive."[22]

Generally the subject matter of proscribed statements is more narrowly specified, as is evidenced by the terms of the order at issue in *U.S. v. Tijerina*.[23] However, instead of proscribing those statements that might be prejudicial in nature, many judges favor a more all-inclusive approach.[24] Thus, they ensure a trial free of publicity of any kind, prejudicial or not, but they necessarily limit speech that is not a threat to the fair administration of justice.

Aspects of a Trial Affected by Silence Orders

Various courts have also differed on the particular aspects of a trial for which silence orders should be valid. Many silence orders are issued during pretrial proceedings, such as discovery, grand jury, and arraignment. At these times, prejudicial publicity may be particular harmful to the impaneling of an impartial jury.

Some courts would make silence orders applicable to bench trials as well as trials by jury. The Seventh Circuit Court of Appeals said, "Properly drawn rules can perhaps prevent the necessity of a judge attempting to remove from his mind information that should not be considered."[25] Other courts argue that once it has become apparent that a case will be tried by a judge alone, any gain from a silence order is outweighed by the substantial restriction on First Amendment rights and is unconstitutional. The Fourth Circuit Court of Appeals maintained that judges must determine whether the accused is

guilty or innocent without considering the evidence they have heard and held to be inadmissible. It is therefore unlikely that extrajudicial comments by trial participants could threaten the fairness of a bench trial.[26]

However, both the Fourth[27] and Seventh[28] Circuits have held that extrajudicial comments should not be proscribed during sentencing because judges are entitled to conduct a broad inquiry and consider almost any factor in exercising discretion during sentencing. Both courts cited *United States v. Tucker* in reaching this conclusion: [a judge may conduct an inquiry] "largely unlimited either as to the kind of information he may consider, or the sources from which it may come."[29]

Finally, there is the question of whether silence orders issued in civil cases should be subject to the same standard of review as those in criminal cases. The Sixth Amendment guarantees the accused in criminal prosecutions "a speedy and public trial, by an impartial jury."[30] In civil cases, only the "right of trial by jury is preserved."[31] It seems reasonable to assume then that prejudicial pretrial publicity would not be a concern in civil cases and that silence orders could not be justified.

The Fourth[32] and Seventh[33] Circuits agreed that a general standard proscribing lawyer comment during civil litigation would be unconstitutional. Both courts cited the large time span of much civil litigation because of broader civil discovery rules, the complexity of many civil controversies, and the priority given criminal cases.[34] Also, civil actions frequently involve questions of societal concern about which complete information is desirable. Silencing lawyers in these cases amounts to shutting off a valuable source of information. It has also been noted that when absolutely necessary, special orders may be entered in civil cases which are tailored to the specifics of the particular proceeding.[35]

Jurisdictional Considerations

Important differences in the standard of review used to assess the constitutionality of

silence orders are found between various regions of the country. The "reasonable likelihood" standard has been applied by the U.S. Court of Appeals, Fourth Circuit,[36] and Tenth Circuit;[37] the Supreme Court of Arizona;[38] the Supreme Court of New Jersey;[39] and the Court of Appeal, Second District of California.[40]

"Serious and imminent threat" or "clear and present danger" has been used by the U.S. Court of Appeals, Seventh Circuit,[41] and Ninth Circuit;[42] and the U.S. District Court, District of Maryland.[43]

Other standards used include "substantial likelihood" by the U.S. District Court, District of South Carolina;[44] "clear and imminent threat" by the Court of Appeals, Sixth Circuit;[45] and a sliding scale by the Court of Appeals, First Circuit.[46]

The Supreme Court has never heard a case on this issue, allowing the decisions of lower courts to stand regardless of the standard of review used. Thus, confusion and inconsistency have surrounded the use of silence orders. When considering a question of the importance of the free speech rights of trial participants, a right guaranteed by the First Amendment, it would seem reasonable to expect the establishment of a national standard of review applicable to all United States citizens.[47]

II. History

Dicta in the Supreme Court's decision in *Sheppard v. Maxwell* may have provided the impetus for the issuance of silence orders in a number of criminal cases. The clash between First and Sixth Amendment rights reached a peak in *Sheppard*. Citing the "carnival atmosphere" surrounding the trial, the Court recommended a number of traditional measures for control of the courtroom: change of venue, continuance, voir dire, jury instructions, and sequestration.[48] The Court was alarmed at the fact that many of the prejudicial news items could be traced to the prosecution and the defense. To alleviate this problem, the Court suggested the following:

> Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of jurors, *the trial courts must take strong measures to ensure that the balance is never weighed against the accused*. . . Of course, there is nothing that proscribes the press from reporting events that transpire in the courtroom. But where there is reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should *continue the case* until the threat abates, *or transfer it* to another county not so permeated with publicity. In addition, *sequestration of the jury* was something the judge should have raised *sua sponte* with counsel. If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered. But we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. *Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function.* Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures."[49]

The Court failed to indicate under what circumstances the extraordinary measure of proscribing trial participants' extrajudicial comments was permissible. Nor did they state what standard of review should be applied, although many courts have subsequently used the "reasonable likelihood" standard because of its mention here in the context of other measures to prevent prejudice. As the Supreme Court has never addressed a case on this issue, it has remained for regional courts to determine the standard of review they deem appropriate.

After 1976, the three-part test stated by the Supreme Court in *Nebraska Press Assn. v. Stuart* was used by several courts as a basis for reviewing silence orders.[50] *Nebraska Press* involved an appeal from an order entered by a Nebraska state trial judge that restrained the media from publishing or broadcasting accounts of confessions or admissions

made by the accused in a multiple murder trial. To determine whether issuance of an order was justifiable, the Court said one must determine "(a) the nature and extent of pretrial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; and (c) how effectively a restraining order would operate to prevent the threatened danger."[51]

United States v. Tijerina

A case frequently cited for its reliance on the standard of a "reasonable likelihood" of a threat to a fair trial is *United States v. Tijerina*.[52] This case was the result of a highly charged criminal trial in New Mexico. A pretrial silence order was entered that forbade the attorneys, witnesses, and defendants from making public statements about the upcoming criminal trial. Several days later, Tijerina made a widely publicized speech at a Convention of Free States. Among other statements, he accused the judge of "using the law to take vengeance and drink blood and humiliate our race." Tijerina and co-defendant Jerry Noll were charged with and convicted of contempt.[53]

The defendants' main argument was that the order infringed on their free speech rights guaranteed by the First Amendment because it failed to meet the "clear and present danger test."[54] The court held, however, that a "reasonable likelihood" of prejudicial news that would tend to prevent a fair trial was sufficient. The court noted that the Supreme Court never insisted that a clear and present danger to the right of a fair trial exist before a court can forbid extrajudicial statements. The court cited the dicta from *Sheppard* with approval, stating that the Supreme Court had used it to establish guidelines necessary to ensure fair trials in cases which attract widespread publicity.

The U.S. Court of Appeals, Tenth Circuit, said that in a case where a balance must be had between free speech and fair trial, the Supreme Court had awarded the preference to fair trial.[55] But the Sixth Amendment guarantees for criminal prosecutions are all rights

granted to the accused. Thus, it was Tijerina's and Noll's right to a fair trial which was at stake. Yet the court apparently felt that since the silence order was designed to protect the defendants, even Tijerina and Noll could not create a risk of a biased jury by making extrajudicial comments.[56]

Chase v. Robson

The following year the U.S. Court of Appeals, Seventh Circuit, used a standard that extrajudicial comment must create "a serious and imminent threat to the administration of justice" to be constitutionally permissible.[57] Frederick Chase and other petitioners were charged with destroying selective service records in Chicago in the wake of the Vietnam War. During pretrial motions, Judge Edwin A. Robson issued an order that prohibited defendants and their attorneys from making any public statements in relation to the case. Robson issued the order as a measure 1) to avert prejudicial pretrial publicity; 2) so that the issues involved in the case would be resolved in the courtroom, not the media; and 3) to effect the serene atmosphere dictated by *Sheppard*. Chase et al. appealed the order as "unconstitutionally overbroad and vague and violative of their [F]irst [A]mendment rights of free speech."[58]

The Court of Appeals held that before a trial court can limit defendants' and their attorneys' free speech rights, the trial court must make specific, on-the-record findings that the conduct is "a serious and imminent threat to the administration of justice."[59] The court stated that either under a standard that the speech must create a "clear and present danger"[60] or a "reasonable likelihood"[61] of a serious and imminent threat to the administration of justice, the trial court's order could not stand because there was not sufficient evidence that a trial with an impartial jury could not be held. The court said that "in the absence of a clear showing that an exercise of those [F]irst [A]mendment rights will interfere with the rights of the government and the defendants for a fair trial, we reject this

prior restraint on [F]irst [A]mendment freedoms."[62]

The Court of Appeals also held that the order was unconstitutionally overbroad because it could prohibit speech that would not have an effect on fair trial rights as well as speech that would.[63] Interestingly, the court never stated which standard--"reasonable likelihood" or "clear and present danger"-- should apply, saying only that Robson's order would be invalid under either standard.

Younger v. Smith

In 1973, California's Court of Appeal for the Second District added a new twist to the standard to be applied for testing silence orders in the companion cases of *Younger v. Smith, Times Mirror Company v. Superior Court,* and *Busch v. Superior Court.*[64] The court stated that, depending on how protective one felt toward the administration of justice, a "reasonable likelihood" of an unfair trial is, by itself, a "clear and present danger" to the administration of justice.[65] The court also said that it believed the correct standard for determining whether a silence order should stand was the "reasonable likelihood" test used in *Tijerina,* and not the "clear and present danger" standard. The court concluded that "[t]o ask [a trial judge] to determine the need for such an order by finding that the situation presents a clear and present danger to the administration of justice is simply to require him to palm off guesswork as finding."[66] The court felt that the difference between the "reasonable likelihood" and "clear and present danger" standards was the difference between a test designed for contingencies and one designed for realities.

Chicago Council of Lawyers v. Bauer

Although "reasonable likelihood" has been the standard in several other circuits, the U.S. Court of Appeals, Seventh Circuit, held that the proper standard should be the "serious and imminent threat" of interference with fair administration of justice as set forth in *Chase v. Robson.*[67] In 1975 the Seventh Circuit Court of Appeals was prepared to reject

the "reasonable likelihood" standard in favor of "clear and present danger." In *Chicago Council of Lawyers v. Bauer,*[68] the question posed was whether the "no-comment" rules of the District Court for the Northern District of Illinois deprived lawyers of their free speech rights under the First Amendment. The issue arose because the rules were not restricted to situations which presented "a clear and present danger of a serious and imminent threat to the administration of justice."[69]

The court held that the rules were overbroad and therefore did not meet constitutional standards. A narrower and more restrictive standard must apply, the court said: only comments that posed a "serious and imminent threat" of interference with the fair administration of justice could be constitutionally proscribed.[70] According to the court, this was the standard formulated in *Chase v. Robson* and reaffirmed in *In re Oliver.*[71] However, the court felt that merely announcing a standard was not enough to eliminate overbreadth. Specific rules were also necessary to avoid vagueness. Each rule must incorporate the serious and imminent threat standard, and not merely be a blanket prohibition on certain areas of comment. The court proceeded to examine each of the "no-comment" rules to determine if the presumption underlying the rule could be considered a proper basis for a limitation on attorneys' First Amendment rights.[72]

Hirschkop v. Snead

The U.S. Court of Appeals for the Fourth Circuit did not agree with the standard adopted by the Seventh Circuit court. In 1979, the Fourth Circuit court followed the lead of the Tenth Circuit and stated that the more appropriate standard was a "reasonable likelihood" that attorneys' comments about pending litigation would be prejudicial to the fair administration of justice.[73]

In *Hirschkop*, an attorney challenged a disciplinary rule adopted by the Supreme Court of Virginia that restricted lawyers' comments about pending litigation. The rule was

based on Canon 20 of the American Bar Association's *Canons of Professional Ethics*. It indicated generally that published statements by a lawyer during the course of litigation may interfere with a fair trial and are usually to be condemned.[74] Hirschkop maintained that the First Amendment precludes any rule limiting speech by lawyers. He contended that fair trials were possible even when prejudicial publicity is imminent by carefully drawn orders confining restrictions on speech to the peculiar circumstances confronting the trial judge.[75]

The court cited numerous authorities that indicated that published statements by a lawyer during the course of litigation may indeed interfere with a fair trial.[76] Then, the court stated that "since less intrusive means of assuring the fundamental right to a fair trial are inadequate, we conclude that a properly drawn rule restricting lawyer's comments about pending criminal prosecutions can be justified by the need to protect the right to a fair jury trial."[77] Based on dicta in *Sheppard v. Maxwell,* the court concluded that the Supreme Court intended the "reasonable likelihood" test to be used to determine the effect of prejudicial publicity on a fair trial. The court stated that "[t]he rules would be meaningless if sanctions could be imposed only when the lawyer's published speech creates unremediable prejudice. They have meaning and appropriateness when so applied as to prevent the lawyer's creation of a reasonable likelihood for prejudice by a violation of one of the expressed prohibitions."[78]

In re San Juan Star Company

Yet another standard was introduced by the U.S. Court of Appeals, First Circuit, in *In re San Juan Star Company* in 1981.[79] Two suspected terrorists were killed in a shootout with police officers in the mountains of Puerto Rico. In a civil rights suit against the police officers arising from this event, the trial judge prohibited attorneys from disclosing any evidence obtained through subsequent depositions to the press, to the litigants themselves,

or to any third party.[80]

The *San Juan Star* challenged that portion of the district court's order prohibiting disclosure of deposition evidence to the press or public.[81] The interest asserted was that of effectively covering an ongoing judicial proceeding of significant hard news interest.[82]

The court noted, however, that the discovery process does not have the long tradition of openness enjoyed by criminal and civil trials. Unlike evidence at trial, information revealed during discovery has not yet passed through the filter of relevance and admissibility: "[t]he information revealed may be irrelevant, prejudicial, or pose an undue invasion of an individual's privacy."[83]

The standard used by the court was modeled after the three-part test introduced in *Nebraska Press*. However, the court decided a less stringent standard should be required due to the limited nature of the first amendment interests at issue. The court looked at 1) the magnitude and imminence of the harm; 2) the effectiveness of the protective order in preventing the harm; 3) the availability of less restrictive means; and 4) the narrowness of the order.[84] Addressing the first item, the court said that the criterion could be best applied using a sliding scale: the graver the potential harm, the less imminent it need be. The court said, "For example, a threatened material harm to a defendant's deep-seated interest in an impartial jury in a civil trial need only be reasonably likely. A claimed injury to less important interests, by contrast, would need to be serious and unmistakeable."[85]

The court found no countervailing interests with regard to the other considerations and would thus apply the strict standard to these criteria. Using these criteria, the court found that the order prohibiting disclosure of deposition contents issued by the trial judge did not infringe the First Amendment rights of the *San Juan Star*.[86]

Levine v. United States District Court

The Court of Appeals for the Ninth Circuit agreed with the standard used by the

Seventh Circuit court--"clear and present danger" or "serious and imminent threat"--in deciding *Levine v. United States District Court*.[87] Richard W. Miller, a former FBI special agent charged with espionage, and his attorneys sought a writ of mandamus to dissolve a restraining order prohibiting the attorneys from communicating with the media regarding the merits of the case.

The order, issued March 5, 1985, resulted from a March 3 *Los Angeles Times* article in which the defense attorneys attacked the basis of the prosecution's case. Initially the order included parties to the case and witnesses, but it was later revised to apply only to attorneys for the government and the defense.[88]

Petitioners sought to characterize the order as an unlawful prior restraint on the press. However, none of the media organizations that could have been affected by the order joined the action. The Court of Appeals decided that the petitoners lacked standing to assert the rights of nonparty media organizations.[89]

The court did agree that the order was properly characterized as a prior restraint on the attorneys' first ammendment right to free speech. Again the influence of the *Nebraska Press* standard is evident: the court stated that the order could only be upheld if 1) the activity restrained posed either a clear and present danger or a serious and imminent threat to a protected competing interest; 2) the order was narrowly drawn; and 3) less restrictive alternatives were not available.[90] The court held that the order met the first and third criteria but not the second. The court said that although the order was not vague, it was overbroad, and many statements that bear on the merits of the case would not interfere with the fair administration of justice. The court decided that the district court must determine which types of extrajudicial statements would result in a serious and imminent threat to the administration of justice and then fashion an order specifying the proscribed types of statements.[91]

III. Press Access

Historical View

In *Branzburg v. Hayes*, the Supreme Court stated that no constitutional right guaranteed the press special access to information not available to the public.[92] Thus, most courts which have addressed the question of the news media's right of access have concluded that only if the public has a right to certain information, then the press, which has a right of the same magnitude, is also entitled to the information.[93]

The Supreme Court, in *Pell v. Procunier, Corrections Director*, sustained a California regulation that media interviews with specifically requested inmates would not be permitted.[94] The regulation was found justifiable because alternative means of communication were available to the inmates and alternative sources of information were available to the press.

The companion case of *Saxbe, Attorney General, v. Washington Post Company*, involved a Federal Bureau of Prisons policy statement that prohibited personal interviews between newsmen and individually requested inmates.[95] The Court held that the regulation did not infringe on the media's First Amendment rights because it was merely an application of the rule that no one may designate an inmate with whom he wishes to visit except a lawyer, clergyman, relative, or friend of the inmate.

Press Access in the Context of Silence Orders

However, courts have also realized that the right to publish news is of little value without access to sources. In *CBS v. Young*, the Sixth Circuit stated that CBS had standing to question the validity of a restraining order because its ability to gather news of the Kent State civil trials was directly impaired by the order.[96] The court cited Justice White's opinion in *Branzburg v. Hayes:* "Without some protection for seeking out news, freedom of

the press could be eviscerated."[97] Thus, the court concluded that news gathering qualifies for First Amendment protection and that the order affected CBS' constitutionally guaranteed right as a member of the press to gather news.

Nevertheless, the Sixth Circuit did not decide the case based on the press' right of access to the information contained in trial participants' extrajudicial comments, but rather on the rights of the trial participants to speak without prior restraint. No court has been willing to accept the press' right to access as a basis for invalidating an order silencing trial participants.

In *KPNX Broadcasting Co. v. Superior Court,* the Arizona Supreme Court denied that the restraining order at issue infringed on the press' right to attend and report on criminal trials. Instead, the court said it only collaterally affected their ability to interview trial participants, "an interest outside the scope of protection of the First Amendment right to attend and report on criminal trials."[98] The Arizona Supreme Court relied on several recent U.S. Supreme Court decisions to reach the conclusion that "'the newsgathering right' in the context of criminal trials means nothing more nor less than the right to attend."[99] The Arizona court found two main reasons for the media right of access to criminal trials: "[f]irst, the criminal trial historically has been open to the press and general public," and "[s]econd, the right of access to criminal trials plays a particularly significant role in the functioning of the judicial process and the government as a whole."[100] But the court noted that nowhere in the extensive history of the public nature of criminal trials related in *Richmond Newspapers* was the right of access to trial participants mentioned. Rather, *Richmond Newspapers* extended press access rights to criminal trials to listening, watching, and reporting only.[101]

Writing in a separate opinion in *KPNX*, in which he concurred in part and dissented in part, Justice Feldman noted that the news gathering right as defined by the Arizona

Supreme Court was "the same right that government has graciously given the press in totalitarian societies such as Argentina, China, and the Soviet Union. If the government can be permitted to erect a wall of secrecy by forbidding those with knowledge from talking to the press, then the right to attend and report what transpires is illusory; it becomes a method by which the government uses the press as a conduit to transmit the official line."[102]

But Justice Feldman's comments reflect a familiar problem: he justifies the press' right of access to trial participants' extrajudicial comments by arguing for the participants' free speech rights. This is understandable. Few courts are willing to acknowledge a special press right of access to information and most emphatically deny the existence of the right. They seem to agree with Justice Potter Stewart, who said in his address to Yale Law School in 1974: "There is no constitutional right to have access to particular government information or to require openness from the bureaucracy."[103] Most cases involving silence orders that are brought by the press have outcomes unfavorable to the press, and those which are favorable are decided on grounds of the trial participants' rights, not those of the press.

This, however, would appear to be the correct basis for a decision. No mention of a press access right is made in the First Amendment and only a qualified right has developed in the courts. Press access itself is really a secondary issue: of primary importance is the lack of availability of sources. This is the result of a government that has indicated in the particular circumstances of criminal trials, select groups of citizens may be denied their free speech rights.

IV. Prior Restraint

At common law, "prior restraint" referred to a system of unreviewable administrative censorship.[104] However, the concept has been expanded to include some judicial orders that have an effect similar to administrative censorship.[105] Orders that restrain

extrajudicial comment about a trial fall in this category, as noted in *Nebraska Press.*[106]

Judicial orders of this type differ from "subsequent punishment" or statutory restrictions on expression that are enforced only after the communication occurs. Suppression orders are directed at specific individuals and the decision not to allow communication is made before it occurs. Subsequent punishment involves a general statute or rule and does not take effect until after the communication has occurred. The individual prosecuted for violating a judicial order may not be allowed the full safeguards of a criminal prosecution, including a jury trial, that one who violates a statute is guaranteed.[107] Also, because a judicial order singles out specific individuals, the likelihood of punishment if the order is violated and the probability that even protected speech will not be engaged in are increased. Statutes pose only a "mute, impersonal threat."[108]

By their nature, prior restraints have a greater deterrent effect than subsequent punishment, and are "the most serious and the least tolerable infringement on First Amendment rights."[109] To be upheld, they must satisfy a stricter standard than the "clear and present danger" test used in cases of subsequent punishment and are permissible only in "exceptional cases."[110]

Court View of Silence Orders as Prior Restraints

Very few courts have taken the step the *Levine* court did when it characterized the district court's order as a prior restraint.[111] Noting that prior restraints are subject to strict scrutiny, the Ninth Circuit said that the order could only be upheld if 1) the activity restrained posed either a "clear and present danger" or a "serious and imminent threat" to a protected competing interest; 2) the order was narrowly drawn; and 3) less restrictive alternatives were not available.[112]

Nevertheless, the court cited the dicta in *Sheppard v. Maxwell* and *Nebraska Press Association v. Stuart,* which stated that greater restrictions may be placed on the free

speech rights of trial participants than of nonparticipants. In *Nebraska Press Association*, Justice Brennan said:

> As officers of the court, court personnel and attorneys have a fiduciary responsibility not to engage in public debate that will redound to the detriment of the accused or that will obstruct the fair administration of justice. It is very doubtful that the court would not have the power to control release of information by these individuals in appropriate cases and to impose suitable limitations whose transgression could result in disciplinary proceedings.[113]

Thus, despite the characterization of the restraining order as a prior restraint, the court evaluated the district court's order in light of the relationship between the petitioners and the court system.[114]

In *Central South Carolina Chapter v. Martin,* the court stated that when a court issues an order that does not constitute a prior restraint on the press' or public's right to speak or publish, but only restrains the trial participants, the "clear and present danger" test does not apply.[115] The court never said that such an order did not impose a prior restraint on the trial participants, but stated that *"Nebraska* has approved the standard set out in *Sheppard* that extrajudicial statements of trial participants which divulge prejudicial information may be proscribed if there is a reasonable likelihood that prejudicial news prior to trial will jeopardize the defendant's right to a fair trial."[116]

In *KPNX,* the court held that the restraining order to which the media objected did not infringe upon their first amendment right to attend and report on criminal trials, but only affected the convenience with which they could interview trial participants. The court failed to note that the restraining order did infringe on the trial participants' First Amendment rights.[117]

The court in *In re San Juan Star Company* concluded that although the order in question involved pretrial discovery materials, the communications were not totally

underserving of First Amendment protection.[118] The court noted that "some of the information produced during discovery presumably will be relevant at trial, newsworthy, and potentially subject to greater protection under the First Amendment."[119] The court stated, however, that the Supreme Court has recognized that the prohibition against prior restraints may not be applicable to all types of speech. For example, commercial speech was cited by the court as not subject to the prohibition against prior restraints.[120] The First Circuit thus justified scrutinizing the restraining orders under a less severe standard than that ordinarily applied to prior restraints.

Court View of Rules Restricting Attorney Comment as Prior Restraints

Several courts have stated that rule DR 7-107 of the *Model Code of Professional Responsibility,* which provides a blanket prohibition against extrajudicial comment by attorneys, does not constitute a prior restraint.[121] In *Chicago Council of Lawyers v. Bauer,* the court found standing no-comment rules similar to prior restraints because they were punishable by contempt. But a prior restraint cannot be violated even if the judicial action is unconstitutional if opportunitites for appeal existed and were ignored.[122] In contrast, challenges to court rules can be made by those prosecuted for violating them because of the distinction between actions taken by a court in its legislative and adjudicative role.[123] Thus, the court would not characterize silence orders as prior restraints and did not assume a "heavy presumption" against their validity.

The Fourth Circuit in *Hirschkop*[124] agreed with the reasoning of the Seventh Circuit in *Chicago Council of Lawyers v. Bauer*. However, the New Jersey Supreme Court in *In re Rachmiel* stressed the responsibility of attorneys to the court, in agreement with Justice Brennan's comments in *Nebraska Press Association v. Stuart.*[125]

Silence Orders and Court Rules Prohibiting Attorney Comment as Prior Restraints

Silence orders are indistinguishable from prior restraints in form. Silence orders are

entered before communication takes place and are directed at a specific person or group of persons. It would seem reasonable to expect, then, that silence orders would undergo the same standard of review as prior restraints. This is, however, simply not the case. As noted above, courts have refrained from considering all silence orders as prior restraints and have used a variety of standards to determine their validity.

Court rules restricting extrajudicial comment by attorneys or court personnel should also be suspect. These limit the speech of individuals who are, at once, in the best and worst position to comment knowledgeably about the judicial processes. For example, all attorneys in Virginia must belong to the Virginia State Bar, which enforces a rule based on DR 7-107.[126] As a member of the Virginia State Bar, Philip Hirschkop was subject to disciplinary action, including disbarment, for comments violating DR 7-107. When the violator of a court rule is subject to subsequent punishment this severe, it can be said to compel the individual to act in the same manner that a prior restraint would.

Thus, a silence order directed at trial participants or a rule that restricts extrajudicial comment by attorneys or court personnel acts as a prior restraint on speech. The standard of review used to determine the validity of these orders and rules must reflect the effect they have on the exercise of participants' free speech rights.

Speech Affected by Silence Orders and Court Rules Prohibiting Extrajudicial Comment

In *Sheppard v. Maxwell*, Justice Clark stressed the responsibility of the press to help insure the fair administration of justice:

> A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.[127]

To effectively carry out this responsibility, the press must have access to those most knowledgeable about the judicial process as it affects them: defendants, witnesses, and attorneys. These are the individuals who must not be silenced if the judicial process is to be effectively scrutinized and criticized by the public.[128]

An individual may never have more of an interest in exercising his free speech rights than when he is a defendant faced with criminal charges. Certainly many defendants wish to protect their reputation, and frequently their livelihood, by claiming their innocence. They should be allowed to do so--the guarantee of an impartial jury is one granted the defendant, not the government. It would be rare indeed for an accused to so effectively taint pretrial publicity that he would be able to overcome the presumption of his guilt.[129]

Furthermore, not all cases involve sensational homicides like those in *Sheppard v. Maxwell* and *Nebraska Press*. Many cases in which silence orders have been issued have involved political issues.[130] Defendants wishing to speak out about issues involved in these cases are engaging in political speech, which is at the core of the First Amendment and is the most protected form of speech.

As representatives of their clients, defense attorneys also need to be able to speak to the public and press. Frequently, a defendant will not be capable of effectively explaining his situation to the public. Defendants in highly publicized cases may not always have access to the press. Thus his attorney becomes his only means for communicating with the public.

The attorney may also have personal reasons for speaking out about a case. Particular forms of injustice may be illustrated by his client's case and the attorney may wish to seek reforms. The attorney is knowledgeable about the area of law affected by a specific case and is in an ideal position to provide information. One court noted that while the media often require guidance and analysis of what transpires at trial, the courts are not

constitutionally mandated to provide such guidance.[131] While this is certainly true, it is also misguided: naturally, an attorney cannot be compelled to explain judicial processes or his view of a particular case or area of law, but he should be allowed to do so if he is so inclined.

Witnesses and prosecuting attorneys may also wish to express their views on a particular case and may have information relevant to the administration of the judicial process. Obviously, there is an increased potential for statements damaging to the defendant by witnesses and attorneys for the prosecution. Interference with the Sixth Amendment rights of the defendant by those hostile to him cannot be allowed even by those exercising First Amendment rights.[132] Courts may find it necessary to limit the types of expression in which certain individuals may engage. However, silence orders issued to insure Sixth Amendment rights are not infringed should still operate under the assumption that all expression is protected under the First Amendment. Such limitations should not be wholesale: they must be very narrowly tailored.

V. Proposed Standard of Review

If the press can claim no right of access to trial participants' extrajudicial comments, but proscription of these comments infringes on First Amendment rights, a standard which the courts can use to ascertain the validity of silence orders must be determined.

The U.S. Supreme Court has indicated in many cases that official action that impacts adversely on First Amendment rights must be justified by a "compelling" or "paramount" public interest.[133] Such an overriding interest is only presented by a countervailing constitutional right. With respect to proscription of trial participants' speech, only the guarantees of the Sixth Amendment provide an interest which may outweigh First Amendment rights.

The Supreme Court has said that "[a]ny prior restraint on expression comes to this

Court with a 'heavy' presumption against its constitutional validity."[134] A prior restraint must undergo strict scrutiny because of the peculiar dangers inherent in such restraints.[135] The burden is on the courts to show ample justification for the imposition of such a restraint.

Many courts have used "clear and present danger" or "serious and imminent threat" as the standard of review for silence orders and court rules proscribing speech.[136] This subjects these prior restraints to strict scrutiny, as is required for constitutional validity. Nevertheless, this standard is exceedingly difficult to apply in the context of criminal trials and pretrial proceedings. The difficulty lies in establishing when a "clear and present danger" or "serious and imminent threat" to a fair trial exists.

A judge cannot know before a trial begins what effect pretrial publicity will have on the impaneling of a jury. He may not even know whether the trial will be heard by a jury or judge. He cannot be aware of other circumstances: whether motions for a continuance, change of venue, change of venire, or sequestration of the jury will be filed. He may know the size of the jury pool, but may still have doubts as to how successful the voir dire process will be in identifying impartial jurors.

Thus, to describe pretrial and trial publicity as creating a "clear and present danger" or a "serious and imminent threat" to a fair trial is fallacious. The "danger" may not be clear, but murky; the "imminence of the threat" may be dubious if the date for trial has not yet been set. Yet, a judge must make a decision to allow or restrict speech by trial participants based on the unknown and unknowable.

A standard of review which provides greater clarity and precision is needed. "Compelling interest" provides such a standard. Inherent in the "compelling interest" standard is a balancing of the state's interest with that of the people: here, a balance between ensuring a defendant in a criminal case a fair trial and ensuring that individuals'

free speech rights are not unnecessarily infringed upon. To survive this standard of review, the state must meet each part of a three-part test. First, the state must show specific findings that its interest in ensuring the defendant a fair trial must result in a limitation on speech because the speech it wishes to restrict would make a fair trial impossible. Second, orders limiting speech must be fashioned in such a manner that only speech that would prejudice the trial is eliminated. Third, other alternatives for ensuring a fair trial, including those mentioned in *Sheppard v. Maxwell,*[137] must be pursued.

This eliminates uncertainty and guesswork: only if it can be shown that allowing communication will result in irremediable harm to a defendant's fair trial rights will the state's interest in suppressing the speech be honored. Obviously, this standard is extremely difficult to meet, but that is as it should be. Free speech rights should not be infringed unless the harm caused by not doing so is irreparable.

VI. Conclusion

Silence orders and standing no-comment rules may become more attractive to judges now that closing the courtroom to the public and press is no longer an option to prevent prejudicial publicity. Although a variety of individuals and a broad range of speech is affected, no national standard of review has emerged. The U.S. Supreme Court has refused to hear any cases on this issue.

Clearly, the First Amendment rights of trial participants are infringed by these orders and rules--they constitute a prior restraint on expression. Although the press has claimed that such orders also act as a restraint on their access to sources, courts have refused to grant the press a right of access to trial participants' proscribed extrajudicial comments.

The standards of review which have been applied are not sufficiently definitive to determine the constitutional validity of such orders and rules. A strict standard of review which can be uniformly applied is required. Compelling interest provides such a standard.

Although the proposed standard is difficult to meet, it will ensure that First Amendment rights are not needlessly sacrificed.

NOTES

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[1]N.Y. Times, Feb. 8, 1988, at A13, col. 2.

[2]*Id.* The Manhattan Federal judge handling the Bess Myerson case issued this order. Myerson, a former City Cultural Affairs Commissioner, was indicted in fall 1987 and accused of trying to influence a judge to reduce alimony payments for her companion in exchange for her hiring the judge's daughter.

[3]Press-Enterprise Co. v. Superior Court of Cal., ____ U.S. ____, 106 S. Ct. 2735, 92 L.Ed.2d 1 (1986).

[4]CBS v. Young, 522 F.2d 234 (6th Cir. 1975).

[5]United States v. Mandel, 408 F.Supp. 673 (D. Md. 1975).

[6]Levine v. U.S. District Court, 764 F.2d 590 (9th Cir. 1985).

[7]*See* ABA Standards Relating to Fair Trial and Free Press (1968); ABA Code of Professional Responsibility and Code of Judicial Conduct 44 no. 85 (1978). DR 7-107 severely restricts an attorney's right to comment when participating in a criminal investigation, a criminal action, a civil action, an administrative proceeding, a juvenile disciplinary proceeding, or a professional disciplinary proceeding.

[8]KPNX Broadcasting Co. v. Superior Court, 678 P.2d 431, 441 (Ariz. 1984) ("But in the context of the criminal trial, the right to gather news means precisely the right to attend the trial and report on what transpires.") *See also* Richmond Newspaper, Inc. v. Virginia, 448 U.S. 555, 576 (1980); Central South Carolina Chapter v. Martin, 431 F. Supp. 1182, 1188 (D.S.C.), *modified*, 556 F.2d 706 (4th Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978).

[9]Branzburg v. Hayes, 408 U.S. 665, 681 (1972) ("Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out news, freedom of the press could be eviscerated.").

[10]In re Russell, 726 F.2d 1007 (4th Cir. 1984); Hirschkop v. Snead, 594 F.2d 356

(1979); United States v. Tijerina, 412 F.2d 661 (10th Cir.), *cert. denied*, 396 U.S. 990 (1969); KPNX Broadcasting Co. v. Superior Ct., 678 P.2d 431 (Ariz. 1984); In re Rachmiel, 449 A.2d 505 (N.J. 1982); Younger v. Smith, 30 Cal. App.3d 138, 106 Cal. Rptr. 225 (1973).

[11]Levine v. U.S. District Court, 764 F.2d 590 (9th Cir. 1985); Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976); In re Oliver, 452 F.2d 111 (7th Cir. 1971); Chase v. Robson, 435 F.2d 1059 (7th Cir. 1970); U.S. v. Mandel, 408 F.Supp. 673 (D. Md. 1975).

[12]Central South Carolina Chapter v. Martin, 431 F. Supp. 1182 (D.S.C.), *modified*, 556 F.2d 706 (4th Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978).

[13]CBS v. Young, 522 F.2d 234 (6th Cir. 1975) (per curiam).

[14]In re San Juan Star Co., 662 F.2d 108 (1st Cir. 1981).

[15]522 F.2d 234 (6th Cir. 1975) (per curiam).

[16]*Id.* at 236.

[17]*Id.* at 239.

[18]Levine v. U.S. District Court, 764 F.2d 590, 593 (9th Cir. 1985) (attorneys); In re Russell, 726 F.2d 1007, 1008 (4th Cir. 1984) (witnesses); In re San Juan Star Co., 662 F.2d 108, 111 (1st Cir. 1981) (attorneys); Central South Carolina Chapter v. Martin, 431 F.Supp. 1182, 1184 (D.S.C.), *modified*, 556 F.2d 706 (4th Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978) (lawyers, parties, witnesses, jurors, and other officials); Chase v. Robson, 435 F.2d 1059, 1060 (7th Cir. 1970) (attorneys and defendants); United States v. *Tijerina*, 412 F.2d 661, 663 (10th Cir.), *cert. denied*, 396 U.S. 990 (1969) (attorneys, defendants, and witnesses); United States v. Mandel, 408 F. Supp. 673, 674 (D. Md. 1975) (all parties, witnesses, attorneys, and agents); KPNX Broadcasting Co. v. Superior Ct., 678 P.2d 431, 433 (Ariz. 1984) (trial participants); In re Rachmiel, 449 A.2d 505, 509 (N.J. 1982) (attorneys); Younger v. Smith, 30 Cal. App.3d 138, 141, 106 Cal. Rptr. 225, 228 (1973) (attorneys).

[19]CBS v. Young, 522 F.2d 234, 242 (6th Cir. 1975) (per curiam).

[20]*Id.* at 239.

[21]*Id.* at 236.

[22]*Id.* at 239-40.

[23]412 F.2d 661, 663. The order covered the attorneys, the defendants, and the witnesses and forbade them to "make or issue any public statement, written or oral, either at a public meeting or occasion or for public reporting or dissemination in any fashion regarding the jury or jurors in this case, prospective or selected, the merits of the case, the evidence, actual or anticipated, the witnesses or rulings of the Court."

[24]Levine v. U.S. District Court, 764 F.2d 590, 593 (9th Cir. 1985) ("not make any statements to members of the news media concerning any aspect of this case that bears upon the merits to be resolved by the jury"); In re Russell, 726 F.2d 1007, 1008 (4th Cir. 1984) ("discussing their proposed trial testimony with members of the media"); In re San Juan Star Co., 662 F.2d 108, 111 (1st Cir. 1981) ("from disclosing any evidence obtained through subsequent depositions to the press, to the litigants themselves, or to any third party"); U.S. v. Mandel, 408 F. Supp. 673, 674 (D. Md. 1975) ("making any extrajudicial public statements relating to the case"); KPNX Broadcasting Co. v. Superior Ct., 678 P.2d 431, 433 (Ariz. 1984) ("not to be in contact with the media during the course of this matter"); In re Rachmiel, 449 A.2d 505, 509 (N.J. 1982) ("making statements that relate to 'any opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case'"); Younger v. Smith, 30 Cal. App.3d 138, 141, 106 Cal. Rptr. 225 , 228 (1973) ("any statement outside of court as to the nature, substance, or effect of any testimony").

[25]Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 256-57 (7th Cir. 1975), *cert. denied,* 427 U.S. 912 (1976).

[26]Hirschkop v. Snead, 594 F.2d 356, 371-72 (4th Cir. 1979).

[27]*Id.* at 372.

[28]522 F.2d at 257.

[29]404 U.S. 443 (1972).

[30]The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . . " U.S. Const. amend. VI.

[31]The Seventh Amendment provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, . . . " U.S. Const. amend. VII.

[32]Hirschkop v. Snead, 594 F.2d 356, 373 (4th Cir. 1979).

[33]Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 257-259 (7th Cir. 1975), *cert. denied,* 427 U.S. 912 (1976).

[34]594 F.2d at 373; 522 F.2d at 257.

[35]In CBS v. Young , 522 F.2d 234 (6th Cir. 1975), the order was struck down because it was not narrowly tailored; in fact, the court found it infringed on First Amendment rights and was patently overbroad and vague.

[36]*See* In re Russell, 726 F.2d 1007 (4th Cir. 1984); Hirschkop v. Snead, 594 F.2d 356 (4th Cir. 1979).

[37]*See* U.S. v. Tijerina, 412 F.2d 661 (10th Cir.), *cert. denied,* 396 U.S. 990 (1969).

[38]*See* KPNX Broadcasting Co. v. Superior Ct., 678 P.2d 431 (Ariz. 1984).

[39]*See* In re Rachmiel, 449 A.2d 505 (N.J. 1982).

[40]*See* Younger v. Smith, 30 Cal. App.3d 138, 106 Cal. Rptr. 225 (1973).

[41]*See* Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975), *cert. denied,* 427 U.S. 912 (1976); Chase v. Robson, 435 F.2d 1059 (7th Cir. 1970).

[42]*See* Levine v. U.S. District Court, 764 F.2d 590 (9th Cir. 1985).

[43]*See* U.S. v. Mandel, 408 F.Supp. 673 (D. Md. 1975).

[44]*See* Central South Carolina Chapter v. Martin, 431 F. Supp. 1182 (D.S.C.), *modified,* 556 F.2d 706 (4th Cir. 1977), *cert. denied,* 434 U.S. 1022 (1978).

[45]*See* CBS v. Young, 522 F.2d 234 (6th Cir. 1975) (per curiam).

[46]*See* In re San Juan Star Co., 662 F.2d 108 (1st Cir. 1981).

[47]Jennings, *Judicial Restraining Orders and the Media: Does It Really Matter Who Is Gagged?,* 16 U. of Richmond L. Rev. 597 n.123 and accompanying text. The author notes that the Supreme Court may have intentionally ignored this issue hoping for a consensus

among the lower courts, but this has not occurred. The Supreme Court has denied certiorari in several cases, including Central South Carolina Chapter v. Martin, 431 F. Supp. 1182 (D.S.C.), *modified*, 556 F.2d 706 (4th Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978); Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976); United States v. Tijerina, 412 F.2d 661 (10th Cir.), *cert. denied*, 396 U.S. 990 (1969).

[48]Sheppard v. Maxwell, 384 U.S. 333, 363 (1966).

[49]Nebraska Press Assn. v. Stuart, 427 U.S. 539, 553-554 (1976) (italics added by the Court) (quoting Sheppard v. Maxwell at 362-363).

[50]*See* Levine v. U.S. District Ct., 764 F.2d 590 (9th Cir. 1985); *I*n re San Juan Star Co., 662 F.2d 108 (1st Cir. 1980).

[51]*Id.* at 562.

[52]412 F.2d 661 (10th Cir.), *cert. denied*, 396 U.S. 990 (1969). Cases which cite the standard espoused by the court include In re Russell, 726 F.2d 1007 (4th Cir. 1984); Central South Carolina Chapter v. Martin, 431 F. Supp. 1182 (D.S.C.), *modified*, 556 F.2d 706 (4th Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978); Rodgers v. United States Steel Corp., 536 F.2d 1001 (3d Cir. 1976); Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976); CBS v. Young, 522 F.2d 234 (6th Cir. 1975) (per curiam); Chase v. Robson, 435 F.2d 1059 (7th Cir. 1970); Zarate v. Younglove, 86 F.R.D. 80 (C.D. Calif 1980).

[53]*Id.* at 665.

[54]*Id.* at 666.

[55]*Id.* at 667 (quoting Estes v. Texas, 381 U.S. 532, 540-41 (1965): "We have always held that the atmosphere essential to the preservation of a fair trial--the most fundamental of all freedoms--must be maintained at all costs. Our approach has been through rules, contempt, proceedings, and reversal of convictions obtained under unfair conditions. Here the remedy is clear and certain of application and it is our duty to continue to enforce the principles that from time immemorial have proven efficacious and necessary to a fair trial.").

[56]*Id.* at 667. "Both the defendants and the public have the right to expect that justice will be done. The defendants have the protection of the order and the responsibility to obey it."

[57]Chase v. Robson, 435 F.2d at 1059 (7th Cir. 1970).

[58]*Id.* at 1060.

[59]*Id.* at 1061(citing Craig v. Harney, 331 U.S. 367 (1947)).

[60]*Id.* at 1061 (citing Wood v. Georgia, 370 U.S. 375 (1962)).

[61]*Id.* at 1061 (citing United States v. Tijerina, 412 F.2d 661 (10th Cir.), *cert. denied*, 396 U.S. 990 (1969)).

[62]*Id.* at 1061.

[63]*Id.*

[64]30 Cal. App.3d 138, 106 Cal. Rptr. 225 (1973).

[65]*Id.* at 240.

[66]*Id.* at 242.

[67]435 F.2d 1059 (7th Cir. 1970).

[68]522 F.2d 242 (7th Cir. 1975), *cert. denied,* 427 U.S. 912 (1976).

[69]*Id.* at 247.

[70]*Id.* at 249.

[71]*Id.* at 249.

[72]*Id.* at 252.

[73]Hirschkop v. Snead, 594 F.2d 356 (4th Cir. 1979).

[74]*Id.* at 362.

[75]*Id.* at 363.

[76]*Id.* at 364.

[77]*Id.* at 365.

[78]*Id.* at 370.

[79]662 F.2d 108 (1st Cir. 1981).

[80]*Id.* at 111.

[81]*Id.* at 112.

[82]*Id.* at 113.

[83]*Id.* at 115.

[84]*Id.* at 116.

[85]*Id.*

[86]*Id.* at 118.

[87]764 F.2d 590 (9th Cir. 1985).

[88]*Id.* at 593.

[89]*Id.* at 594. Generally, trial participants do not have standing to assert the rights of nonparty media organizations; nor can media organizations assert the rights of nonparty trial participants. *But see infra* n.96 and accompanying text.

[90]*Id.* at 595.

[91]*Id.* at 599.

[92]408 U.S. 665, 684-85 (1972).

[93]*See* Pell v. Procunier, 417 U.S. 817 (1974); Saxbe v. Washington Post Co., 417 U.S. 843 (1974).

[94]417 U.S. 817 (1974).

[95]417 U.S. 843 (1974).

[96]522 F.2d 234, 238 (6th Cir. 1975).

[97]*Id.* (citing Branzburg v. Hayes, 408 U.S. 665, 681 (1972)).

[98]678 P.2d 431, 439 (Ariz. 1984).

[99]*Id.* at 441.

[100]*Id.* at 441 (citing Globe Newspaper Co. v. Superior Ct. 457 U.S. 596, 605-606 (1982)).

[101]*Id.* at 441 (citing Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 576 (1980)).

[102]*Id.* at 444.

[103]U.S. v. Mitchell, 386 F.Supp. 639 (D.C.D.C. 1975) (citing Justice Potter Stewart's address on November 2, 1974 at the Yale Law School Sesquicentennial Convocation, New Haven, Connecticut).

[104]Pittsburgh Press Co. v Pittsburgh Comm. on Human Relations, 413 U.S. 376, 389-90 (1973); Near v. Minnesota, 283 U.S. 697, 713-15 (1931); T. Emerson, *The Doctrine of Prior Restraint,* 20 Law & Contemp. Prob. 648, 650 (1955).

[105]L. Tribe, American Constitutional Law §12-32 at 726 n.2 (1978).

[106]Nebraska Press Association v. Stuart, 427 U.S. 539, 561 (1976).

[107]*See, e.g.*, T. Emerson, *supra* note 104, at 657-658; L. Tribe, *supra* note 105, at 726 n.1.

[108]L. Tribe, *supra* note 105, at 726 n.2.

[109]Nebraska Press Assn. v. Stuart, 427 U.S. 539, 559 (1976).

[110]Near v. Minnesota, 283 U.S. 697, 716 (1931).

[111]Levine v. U.S. District Court, 764 F.2d 590, 595 (9th Cir. 1985).

[112]*Id.*

[113]427 U.S. at 601 n. 27.

[114]764 F.2d at 596.

[115]Central South Carolina Chapter v. Martin, 431 F. Supp. 1182, 1188 (D.S.C.), *modified*, 556 F.2d 706 (4th Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978).

[116]*Id.*

[117]KPNX Broadcasting Co. v. Superior Court, 678 P.2d 431 (Ariz. 1984).

[118]In re San Juan Star Co., 662 F.2d 108 (1st Cir. 1981).

[119]*Id.*

[120]*Id.* (citing *Virginia* Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748, 771-72 n. 24 (1976)). This would seem to be a rather inapt comparison--trial participants frequently engage in positical speech, which should receive the greatest degree of protection under the First Amendment.

[121]*See* Hirschkop v. Snead, 726 F.2d 1007 (4th Cir. 1984); Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975), *cert. denied,* 427 U.S. 912 (1976); In re Rachmiel, 449 A.2d 505 (N.J. 1982).

[122]522 F.2d at 248 (citing Walker v. City of Birmingham, 388 U.S. 307 (1967)).

[123]522 F.2d at 248.

[124]594 F.2d 356, 369 (4th Cir. 1979).

[125]449 A.2d 505 (N.J. 1982). *See supra* n. 49 and accompanying text.

[126]Hirschkop v. Snead, 726 F.2d 1007 (4th Cir. 1984).

[127]Sheppard v. Maxwell, 384 U.S. 333, 350 (1966).

[128]*See* Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 250 (7th Cir. 1975), *cert. denied*, 96 S.Ct. 3201 (1976)("[I]t is only when the litigation is pending and current news that the public's attention can be commanded.")

[129]Note, *Silence Orders--Preserving Political Expression by Defendants and Their Lawyers*, 6 Harv. C.R.-C.L. L. Rev. 599, n.22 and accompanying text (1971). "Since a common sense presumption of guilt accompanies an indictment, a silence order also contributes to an atmosphere of bias against the defendant by preventing him from casting doubt on the government's allegations and correcting the balance in the public mind."

[130]Hamilton v. Municipal Court, 76 Cal. Rptr. 168 (Ct. App. 1969); United States v. Tijerina, 412 F.2d 661 (10th Cir.), *cert. denied*, 396 U.S. 990 (1969); Chase v. Robson, 435 F.2d 1059 (7th Cir. 1970).

[131]KPNX Broadcasting Co. v. Superior Ct., 678 P.2d 431, 441 (Ariz. 1984).

[132]Freedman and Starwood, *Prior Restraints on Freedom of Expression by Defendants and Defense Attorneys: Ratio Decidendi v. Obiter Dictum*, 29 Stanford L. Rev. 607, 617-618 (1977). "It is one thing to say that the defendant should be free to exercise his or her [F]irst [A]mendment rights; if that should boomerang and result in so much prejudicial publicity that the defendant must waive one or more [S]ixth [A]mendment rights, so be it. But a state, through its prosecutors, may not create prejudicial pretrial publicity that compels the defendant to forfeit other basic rights under the [S]ixth [A]mendment in an effort to avoid the full impact of damaging publicity."

[133]*See* Press-Enterprise Co. v. Superior Court of Cal., 464 U.S. 501, 510 (1984) (presumption of open public proceeding in criminal trials embodied in First Amendment applies to *voir dire* examination and can be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 581 (1980) (absent an overriding interest articulated in findings, the right of the public and press to attend criminal trials is guaranteed under the First and Fourteenth Amendments). *See also* DeGregory v. Attorney General of New Hampshire, 383 U.S. 825, 829 (1966); NAACP v. Button, 371 U.S. 415, 439 (1963); Bates v. Little Rock, 361 U.S. 516, 524 (1960); NAACP v. Alabama, 357 U.S. 449, 464 (1958); Thomas v. Collins, 323 U.S. 516, 530 (1945); Schneider v. State, 308 U.S. 147, 161 (1939).

[134]Carroll v. Princess Anne, 393 U.S. 175, 181 (1968); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963).

[135]N. Nimmer, Nimmer on Freedom of Speech §4.09[B] (1984); L. Tribe, *supra* note 105, at 726.

[136]*See supra* notes 39-41and accompanying text.

[137]Sheppard v. Maxwell, 384 U.S. 333 (1966).